In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1218

ELLIOTT ASHTON WELSH, II, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 404 F. 2d 1078.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1968. A petition for rehearing was denied on January 31, 1969. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to April 1, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Selective Service Act may constitutionally be applied to require induction into the

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Armed Forces of a registrant who declares his opposition to military service on nonreligious grounds.

2. Whether the Armed Forces have authority to induct a registrant who refuses to reexecute an Armed Forces Security Questionnaire at the induction station.

STATEMENT

After a jury-waived trial in the United States District Court for the Central District of California, petitioner was found guilty of refusal to submit to induction into the Armed Forces in violation of 50 U.S.C. App. 462. On June 1, 1966, he was sentenced to imprisonment for three years. On appeal the conviction was affirmed. (Pet. App. A1–A15), one judge dissenting (Pet. App. A15–A27).

The evidence showed that on February 2, 1960, petitioner registered with Local Board No. 92 in Los Angeles County, California (Exh. 1).[1] In December 1961, he was classified I–A, a classification he acknowledged when he applied for and received permission to depart the United States for a one-year period (Exh. 8). On March 27, 1964, he was ordered to report for a physical examination (Exh. 8). In April 1964 he requested exemption from combatant training and service on the special form for conscientious objectors, stating that he was "conscientiously opposed to participation in war in any form." In completing this form, he struck out religion as a basis for his opposition and also answered that he did not

[1] "Exh." refers to petitioner's Selective Service file, which was introduced into evidence as government's Exhibit 1.

believe in a Supreme Being.[2] On May 12, 1964, the Local Board granted this requested exemption and classified him I–A–O (Exh. 11, 16–17). On May 25, 1964, he wrote a letter stating that he wished to appeal the classification and asked for a personal appearance before the local board. For the first time, he expressed opposition not only to combatant service but to non-combatant service as well, saying that any participation in the Armed Forces would implicitly condone and contribute to the mission of the military (Exh. 26). After his appearance, the local board advised him that since he had appealed his classification, the Appeal Board would decide whether he qualified for a non-combatant or I–O classification (Exh. 29). He thereafter again appealed his classification (Exh. 31). In July 1964, the Appeal Board tentatively determined that petitioner should not be classified I–O, or in a lower class (Exh. 37).

In July 1965 petitioner personally appeared before a Department of Justice hearing officer who found that there was "no religious basis" for petitioner's conscientious objector's claim. The hearing officer concluded, therefore, that petitioner's objection to military service did not come within the statutory exemption. In August 1965, the Department of Justice accepted this recommendation and so advised the Appeal Board (Exh. 42). On October 13, 1965, petitioner wrote to the Appeal Board, contending that his anti-war beliefs should be considered religious in nature because he viewed "both ethical and religious

[2] On May 8, 1964, he was found fully acceptable for induction into the Armed Forces.

values [as] aris[ing] from the same source: the individual's concern for other individuals" (Pet. App. A24).

On November 15, 1965, petitioner was classified I–A by the Appeal Board and his file was returned to the local board (Exh. 68). On November 22, 1965, he was ordered to report for induction. On November 30, 1965, his employer requested a postponement of induction, stating that petitioner's specific assignment as a mathematician and scientific computer programmer "involves the entire responsibility for the scientific programming of a computer which is utilized as a turbojet engine analysis of several military aircraft which are being utilized in Viet-Nam at this time." After this request was denied, petitioner reported to the induction center on December 8, 1965, and refused to step forward for induction (Exh. 104).

ARGUMENT

1. Petitioner contends that, as applied to him, the statutory standard which grants exemption to any person from military service "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form" (50 U.S.C. App. 456(j)) violates the Establishment Clause of the First Amendment. The majority of the court below refused to decide that issue because it found the question was neither briefed nor argued in petitioner's opening brief (Pet. App. A15). It held that since petitioner himself had denied that his objection to war was premised on religious belief, the Appeal Board could take him at his word and conclude that he

failed to meet the statutory standard. The dissenting judge, although he would have met the constitutional question if necessary, was of the view that, in light of *United States* v. *Seeger*, 380 U.S. 163, petitioner's objections to war were sufficiently of a religious nature to qualify him for a I–O classification.

The majority opinion was correct in holding that there was a basis in fact for the conclusion that petitioner's beliefs have no religious foundation. As to the constitutionality of the statute, this issue is before the Court in *Vaughn* v. *United States*, No. 1493 Misc., this Term, and is also presented in *McQueary* v. *United States*, No. 1813 Misc., this Term. In addition, the government has noted an appeal to this Court from the ruling of Judge Wyzanski in *United States* v. *Sisson* (D. Mass., decided April 1, 1969), which presents a similar question. We adhere to the position taken in our opposition in *Vaughn*—that Congress, consistent with the First Amendment, may exclude from conscientious objector status those whose opposition to war stems, in the words of Section 6(j), from "essentially political, sociological, or philosophical views or a merely personal moral code." We recognize, however, that, as to that issue, this case will presumably be governed by the disposition in *Vaughn*, *McQueary* and *Sisson*.

2. Petitioner executed an Armed Forces Security Questionnaire in April 1964. When he appeared for induction in December 1965, he refused to reexecute this form. Army Regulation 601–270 provides, in paragraph 80, that no one who refuses to execute a secur-

ity questionnaire shall be inducted into the Armed Forces pending completion of an investigation. The regulation also limits the validity of a completed security questionnaire to a period of 120 days. Petitioner claims that he was denied due process of law when induction station personnel ordered him to step forward to be inducted without first conducting a security investigation. As the court of appeals concluded (Pet. App. A12–A13), rejection of a registrant by the Armed Forces for security reasons is wholly for the benefit of the Army and may be waived. Petitioner, therefore, has no basis for complaint in this regard.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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